Supreme Court, U. S.
FILED
MAR 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-1128

KATHRYN ANN FAY,

Petitioner,

v.

RALPH W. RICHTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION TO DISMISS OR DENY PETITION FOR WRIT OF CERTIORARI

Respondent moves to dismiss or deny the petition for a writ of certiorari, pursuant to Rule 16 (1) (b) and (c) of the Rules of this Court.

JURISDICTION

The Supreme Court should not accept jurisdiction of this appeal or application for writ of certiorari under 28 U.S.C. 1257 (3) for the reason that this Court has determined that statutes of limitations go to matters of remedy and not to the destruction of fundamental rights. *Chase Security Corp.* v *Donaldson,* 325 U.S. 304, 89 L. Ed. 1628, 65 S. Ct. 1137.

This Court has continually held therefore that the enactment of as well as the construction of statutes of limitations are questions for state courts and their decisions are not reviewable in the Supreme Court. *Seneca Nation* v. *Christy,* N.Y., 16 S. Ct. 828, 162 U.S. 283, 40 L. Ed. 970 (1896); *Texas, etc. R.C.* v. *Miller,* Texas, 31 S. Ct. 534, 221 U.S. 408, 55 L. Ed. 789 (1911); *Preston* v. *Chicago,* Ill., 33 S. Ct. 177, 226 U.S. 447, 57 L. Ed. 293 (1913); *Wood* v. *Chesborough,* Miss., 33 S. Ct. 706, 228, U.S. 672, 57 L. Ed. 1018 (1913); *Woods* v. *Neirstheimer,* Ill., 66 S. Ct. 996, 328 U.S. 211, 90 L. Ed. 1177 (1946).

QUESTIONS PRESENTED

Respondent takes exception to Questions Presented as set forth by petitioners for the reason that the record contains no evidence by affidavit or otherwise that the surgical procedure performed by respondent involved the entrapment of a nerve.

STATEMENT OF THE CASE

Once again, Respondent takes exception to the inclusion of alleged facts which are not a part of the record of this case.

Judge Black stated in his opinion that there was no basic dispute about the facts, but referred to the critical dates as the "facts."

The record contains no evidence that would support the statement that: "Said improvement disguised the latent injury which did not manifest itself until the passage of time" or that "The petitioner later began to experience pain and started to develop a visible deformity in her feet", or that "the alleged two corrective surgeries required substantial periods of hospitalization and recuperation."

OPINIONS BELOW

The opinion of the Common Pleas Court of Hamilton County, Ohio and the Decision of the Court of Appeals, First Appellate District to Hamilton County, Ohio, are attached to Petitioner's Application for Writ of Certiorari and are noted respectively as Appendix A and B.

ARGUMENT

The facts in this case disclose that Petitioner filed her complaint on April 14, 1975 and that the physician-patient relationship terminated on January 12, 1971.

Section 2305.11, Ohio Revised Code, stated as follows:

> "An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided than an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued."

The above section was amended by the Ohio State Legislature effective September 10, 1974, and reads in part as follows:

> "(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accured.
>
> If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical malpractice case that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

It makes little or no difference which statute is applied, since with respect to the within facts, there is no difference between the amended statute and the statute as it existed prior to amendment.

In either event the petitioner was to bring her action within one year from the time the cause thereof accrued and the question then arose as to when did the cause of action accrue?

The case of *Wyler* v. *Tripi,* 25 O.S. 2d 164, decided by the Supreme Court of Ohio on February 24, 1971, stated:

> "1. Under R.C. 2305.11, a cause of action for medical malpractice accrues at the latest when the physician-patient relationship finally terminates."

Then on December 15, 1972, the Supreme Court of Ohio, in the case of *Melnyk* v. *The Cleveland Clinic,* 32 O.S. 2d 198, stated as follows:

> "1. Where a metallic forceps and a nonabsorbent sponge are negligently left inside a patient's body during surgery, the running of the statute of limitations governing a claim thereof is tolled until the patient discovers, or by the exercise of reasonable diligence should have discovered the negligent act."

Thus the rule laid down in *Wyler* v. *Tripi, supra.,* was modified only in a situation whereby a foreign obpect was left in a patient's body during surgery.

In the *Melnyk* v. *Cleveland Clinic case supra.,* the court in its opinion stated as follows:

> "Under the record presented here, we are not now faced with facts akin to those in Wyler. In the instant case, it is difficult, if not impossible, to imagine a defense to the act charged. To carelessly leave a large and obvious metallic forceps and a nonabsorbent sponge in a surgical patient's body is negligence as a matter of law, and the proof thereof is generally unsusceptible to speculation or error. The relationship between the utterly helpless surgical patient and his surgeon, during surgery, is such that the latter must be held to have assumed the responsibility for the removal of such articles, excepting only those which are intentionally left there for sound medical reasons. Furthermore, as problems of proof and defense dwindle, so does the persuasiveness of the 'stale claims' reasoning.
>
> We need not disturb the holding in Wyler, nor interfere in the affairs of our sister branch of government, in order to accord this rule of law the viability we have determined it must have. The Wyler syllabus speaks only of the time of accrual of an action for medical malpractice, and avoids the all-inclusive language of

the syllabus in *Delong* v. *Campbell,* 157 O. St. 22, 47 O.O. 27, 104 N.E. (2d) 177 (1952), and *Gillett* v. *Tucker,* 67 O.St. 106, N.E. 865 (1902). Thus, while a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship finally terminates, the negligent leaving of a metallic forceps and a nonabsorbent sponge inside a patient's body during surgery will toll the running of the statute of limitations upon the cause of action until such time as the patient discovers or by the exercise of reasonable diligence should have discovered, the negligent act.

As stated in Wyler, many states have adopted varying rationales for supporting a tolling theory in cases where forceps or other instruments and implements have been carelessly left in surgical openings. These include fraudulent concealment 'unknown and inherently unknowable' conditions, 'constructive' fraudulent concealment, and 'continuing negligence' approaches. Whichever choice other states have made, it is our opinion that pressures associated with modern surgeon-patient relationships supply an even sounder and broader basis for announcing an exception to the general rule in cases such as the one at bar. Hence, we base our reasoning not only upon an absence of the vexatious inequities usually associated with the entertaining of 'stale' medical claims, but also upon matters of sound public policy, springing from the absolute and irrevocable dependence of patient upon surgeon during surgery and from the huge increase in societal or public medicine with its lamentable but concomitant lessening of the fiercely private surgeon-patient relationship of years past. The facts at bar bear witness to the hypostasis [sic] of our determination in that regard.

The judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Common Pleas for further proceedings.

Judgment reversed."

As indicated previously the Ohio State Legislature was fully aware of the *Melnyk* v. *Cleveland Clinic* ruling when it amended Section 2305.11 and determined to make no changes in this area.

Thus it can be seen that it is clearly the intention to have two separate and distinct classifications with respect to the limitation of actions for medical malpractice.

The first classification embodies all situations where foreign objects are left in a patient during surgery. The second classification embodies all other actions for medical malpractice.

This judicial application of the Ohio Limitation of Actions section does not constitute a denial of equal protection of the law.

Petitioner in her "Reason for Granting the Writ" at Page 6, cited the case of *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95, 93 S. Ct. 2286, 2290, 33 L. Ed. 212 (1972), and quoted said case as follows:

> "However, [i] in all equal protection cases * * * the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."

Extending this test further, Petitioner, also at Page 6, cited the case of *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972), which case stated at Page 777 of the L. Ed. as follows:

> "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. * * * The essential inquiry in all the foregoing cases is, however, inevitably a dual one. What legitimate state

interest does the classification promote? What fundamental personal rights might the classification endanger?"

Unquestionably, the right to sue is a fundamental right granted to the citizens of the United States by the 5th and 14th Amendments.

As noted at 51 Am. Jur. 2d. 611, *Limitations of Actions*, 527 (1970), the Supreme Court of the United States has adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitations go to matters of remedy used not to the destruction of fundamental rights. (Emphasis supplied). The establishment of statutes of limitations is always a legislature prerogative. The case of *Chase Security Corp.* v. *Donaldson, supra,* states that:

"Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims and the citizens from being put to his defense after memories have faded, witnesses died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. *Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual.* He may, of course, leave the protection of the policy while it exists, but the history of pleas of limitation show them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." (Emphasis supplied)

Therefore, in answer to the questions proposed in *Weber*

v. *Aetna, supra.*, the classification in the medical malpractice statute of limitations distinguishing a surgical procedure which negligently leaves a foreign object trapped within the body from a surgical procedure which is merely performed negligently, does state a legitimate state interest. In the first instance, to carelessly leave a large and obvious metallic forceps and a nonabsorbent sponge in a surgical patient's body is negligence as a matter of law, the proof thereof being generally unsusceptible to speculation or error. *Melnyk* v. *Cleveland Clinic, supra.* Here the lapse of time does not entail the danger of a false or frivolous claim, nor the danger of a speculative or uncertain claim. Therefore, the Supreme Court of Ohio has determined that in this situation the running of the statute of limitations is tolled or suspended until the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act.

On the other hand, *Wyler* v. *Tripi, supra,* limited the time in which a cause of action for medical malpractice accrued, at the latest, to that point of time where the physician-patient relationship finally terminated.

The reason for the classification is that the first instance involves a case that is negligence as a matter of law and the proof is apparent, whereas the second instance involves a matter where negligence has to be proved. Accordingly, the statute of limitations is a device to spare the courts from litigation of stale claims, where witnesses needed to prove the negligence have died or disappeared and evidence has been lost.

The answer to the second question, in *Weber,* is that the classification distinguishing a surgical procedure which negligently leaves a foreign object trapped within the body from all other types of medical malpractice, does not endanger a fundamental personal right. As stated above, the

right to sue is a fundamental personal right but, the right to impose statutes of limitations go to matters of remedy and not to the destruction of fundamental rights. Therefore, we respectfully submit to the Court that the classification in question is necessary to promote a compelling governmental interest and as such does not violate the equal protection clause of the 14th Amendment or the equal protection of the personal rights of individuals living in Ohio.

CONCLUSION

It is respectfully submitted, that in the situation at bar, Petitioner filed her suit more than three (3) years beyond the running of the statute of limitations; that the issue involved is one which has been resolved properly by Ohio courts and in an area of the law which is not subject to review by this Court.

Respectfully submitted,

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